UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ARGOS USA LLC d/b/a ARGOS READY MIX, LLC,	)	
Respondent,	)	
	)	**Cases: 12-CA-196002**
and	)	**12-CA-203177**
CONSTRUCTION AND CRAFT WORKERS LOCAL UNION NO. 1652, LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO	)	
Charging Party.	)	

RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Pages(s)**

Statutes

I. STATEMENT OF THE CASE

A. OVERVIEW

This case arises out of charges filed by Construction and Craft Workers Local Union No. 1652, Laborers' International Union of North America, AFL-CIO (the Union), alleging that Argos USA LLC d/b/a Argos Ready Mix, LLC (Respondent or Argos) 1) maintained overbroad policies concerning confidential information, electronic communications, and cell phones in violation of Section 8(a)(1) of the Act; 2) suspended employee Emmanuel Excellent on March 3, 2017,[1] and discharged him on April 28, pursuant to the alleged overbroad cell phone policy in violation of Section 8(a)(1); and 3) failed to provide the Union notice and an opportunity to bargain before suspending Excellent on March 3 in violation of Section 8(a)(5) and (1).[2] The Regional Director for Region 12 issued a complaint based on these allegations on January 31, 2018.[3]

The case was tried June 13 to 15, 2018, in Miami, Florida, before Administrative Law Judge Kimberly Sorg-Graves. On May 14, 2019, the judge issued a decision finding that Respondent unlawfully maintained overbroad confidential information, electronic communications, and cell phone policies, suspended and discharged Excellent pursuant to the cell phone policy, and failed to provide the Union notice and an opportunity to bargain before suspending Excellent.

The judge's decision and recommended order are grounded in critical mistakes of fact and law. She rejected unrebutted evidence without explanation, misinterpreted or ignored important

[1] All dates referenced herein are in 2017, unless otherwise indicated.

[2] There is no allegation that Respondent failed to provide the Union notice and an opportunity to bargain over Excellent's discharge.

[3] The Union's charges also alleged that Respondent 1) unilaterally implemented a new cell phone policy; 2) refused to provide information to the Union related to the cell phone policy; and 3) suspended and discharged Excellent because of his alleged union activities and sympathies (GC Exh. 1(a) and (d)). Those allegations are not part of the complaint.

testimony and exhibits, and drew numerous conclusions without record support. Moreover, she erroneously shifted the burden of persuasion away from the General Counsel, and she misread and thereby misapplied binding Supreme Court and Board precedent.

First, Respondent's confidential information and cell phone policies are not unlawful under *The Boeing Company*, 365 NLRB No. 154, slip op. (2017), because the policies, when reasonably interpreted, *would not* potentially interfere with NLRA rights. Moreover, even assuming arguendo that the policies, when *reasonably* interpreted, would potentially interfere with NLRA rights, Respondent's legitimate business justifications associated with the policies far outweigh any potential interference.

Second, Respondent's electronic communications policy is not unlawful under *Purple Communications, Inc.*, 361 NLRB 1050 (2014), because no evidence was presented that any statutory employees have ever been granted access to Respondent's email system in the course of their employment. Further, *Purple Communications* should be overruled, and the Board should return to prior precedent, which held that employees have no statutory right to use their employer's email system for Section 7 purposes.

Third, Respondent did not unlawfully suspend or discharge Excellent for violating its cell phone policy because the cell phone policy is not unlawful. Even assuming arguendo that Respondent's cell phone policy is unlawful, Excellent's suspension and discharge pursuant to that policy was still not unlawful because he was discharged for using—not merely possessing—his cell phone, and the judge acknowledged that Respondent's policy is lawful to the extent it prohibits employees from *using* cell phones while operating commercial vehicles.

Finally, Respondent did not unlawfully fail to provide the Union notice and an opportunity to bargain before suspending Excellent under *Total Security Management Illinois 1, LLC*, 364

NLRB No. 106, slip op. (2016). First, *Total Security* should be overruled, and the Board should return to prior precedent, which held that, when an employer does not change its pre-existing disciplinary policies but merely exercises some discretion in applying them, the imposition of discipline pursuant to those policies does not constitute a change in a term or condition of employment thereby triggering a bargaining obligation. Second, even if *Total Security* is not overruled, it is not controlling here because Respondent's managers were acting pursuant to a long-standing practice of automatically (i.e., without exercising discretion) suspending employees pending investigation for suspected violations of the cell phone policy. Third, even if Respondent exercised discretion in suspending Excellent, its failure to provide the Union notice and an opportunity to bargain was excused due to exigent circumstances.

B. SUMMARY OF FACTS

1. Overview

Argos produces and supplies ready mix concrete products to customers in several geographical areas of the United States, including in South Florida where the events giving rise to this case occurred (Tr. 55-56). Argos owns approximately 300 plants in the United States, although not all are operational (Tr. 59). The South Florida Division, which is part of the Argos-Florida Region, includes 23 ready mix plants and employs a total of 220 employees, 150 of whom are drivers (Tr. 242-244). The Naples, Florida plant is part of the South Florida Division and includes 11 drivers, who are Respondent's only employees represented by a union (Tr. 192).[4]

[4] The judge took issue with Respondent's repeated references in its post-hearing brief to "Argos-Florida" as if it were a separate entity (ALJD p. 3, fn. 5); however, Respondent was entirely warranted in focusing on Argos-Florida. The investigation preceding the issuance of the complaint focused exclusively on the Argos-Florida Region and, more specifically, the Naples plant. During its investigation the Region never requested—and Respondent never produced—evidence regarding the day-to-day operations, structure, or policies of other Argos divisions or regions. The complaint similarly focused on Argos-Florida, highlighting the Naples plant and identifying only supervisors and managers connected with Florida. Consistent with the scope of the investigation

2. History of Argos

Argos first entered the United States market to supply ready mix and other concrete products in 2005. Before that time, Argos did not own or operate any plants in this country. (Tr. 65.) Argos's approach to building a network of ready mix plants in the United States was based on a well-recognized growth model that relies on purchasing available businesses in the same industry and then "bringing [them] together" into a larger, connected organization (Tr. 65-66).

In 2005, Argos first acquired the assets of ready mix company Southern Star, located in Texas and Arkansas. Argos continued its "networking" approach by acquiring RMCC[5] in 2007-2008, with plants in the Carolinas and Virginia. (Tr. 65-66.) Additional "networking" targets were acquired between 2008 and 2013, including ready mix plants in the Carolinas and Georgia (Tr. 66).

In 2013, Argos acquired its current Florida Region from Vulcan Materials (Tr. 66, 178, 242-243).[6] Argos-Florida consists of five divisions: Orlando, Gainesville, Jacksonville, Tallahassee, and Ft. Myers (South Florida) (Tr. 245). It is undisputed that Argos-Florida has continued to operate largely as it did when it was under the Vulcan and Florida Rock banners.

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and complaint, the hearing also focused on Argos-Florida. At the hearing Respondent introduced evidence of comparator discipline solely from the Argos-Florida Region (R. Exhs. 3, 5-9, 12-16), as well as evidence that while Respondent strived to have uniform policies, practices, and procedures across its regions, that had not been accomplished at the time of the hearing (Tr. 64-66). Pursuant to an agreement with counsel for the General Counsel, after the hearing Respondent and counsel for the General Counsel introduced 46 additional examples of discipline comparators from outside the Argos-Florida Region (R. Exhs. 17-53; GC Exhs. 16-24), but Respondent maintained its position that such evidence was irrelevant, and no additional evidence was introduced concerning those examples. Given the scope of the Region's investigation, the complaint, and the presentation of evidence at the hearing, the judge's failure to focus her findings of fact and conclusions of law on "Argos-Florida," including her recommended nationwide posting remedy, was in error.

[5] While the transcript identifies the company as "RNCC," the correct acronym is RMCC, which stands for Ready Mixed Concrete Company.

[6] Vulcan Materials' ready mix organization in Florida had previously been owned by the Florida Rock Company (Tr. 178, 243, 287).

Specifically, most of Argos-Florida's predecessors' policies, procedures, and day-to-day practices were left unchanged following the acquisition, including the cell phone policy at issue in this case (Tr. 66, 275).

3. Argos' Administration

Mike Beer is the Director of Human Resources for Argos (Tr. 55). Reporting to Beer are four human resources (HR) managers, one for each Region (Tr. 56). Monique Wallace is the HR Manager for the Argos-Florida Region (Tr. 58). While Beer oversees the HR functions for all Argos plants, the HR managers who report to him handle all the day-to-day employee relations functions for their respective regions (Tr. 55-56).

Robert Marion is the Division Manager for South Florida, which spans from Tampa to Miami and includes the Naples plant (Tr. 242-243).[7] District Manager Chad Kennedy reports to Marion and is responsible for five facilities between Port Charlotte and Naples, including the Naples plant, which he visits at least once per week (Tr. 333-336).

Spencer Johnson is the Plant Supervisor at the Naples plant and reports directly to Kennedy (Tr. 247). He is primarily responsible for running payroll, ordering materials, batching the concrete products, and ensuring the drivers load and deliver the correct customer products (Tr. 246-248, 336).

4. Argos' Policies

Beer testified that as each of the "roll-up" acquisition plants came onboard, they continued to operate with many of their existing policies, procedures, and practices (Tr. 64-66). Beer explained that, although he has worked to "bring together" all geographical groups into using the

[7] Marion worked for Argos' predecessors Vulcan and Florida Rock (Tr. 242-243).

same common, consistent policies, practices and procedures, his efforts are "not completed yet" (Tr. 66).

a. Confidential information policy

Argos maintains a confidential information policy at all of its facilities. As a condition of employment employees sign an "Employee Confidential Information Agreement" outlining the policy. (Tr. 68; GC Exh. 3.) The policy prohibits employees from using or disclosing "confidential information," which is defined as follows:

> [A]ll private information not generally known in the industry and not readily available, written or otherwise[,] including, but not limited to, information regarding Argos' customers, customer lists, prospective customers, customers' buying habits, production methods (including designs, formulas, techniques, processes), and non-published prices, discounts, commissions, costs, supplier information, earnings, contracts, employee information, subcontractors, business plans, marketing and/or supply strategies, training programs, computer software or programs, and other business arrangements.

(GC Exh. 3.)

District Manager Kennedy testified that during his tenure as a manager, no employees have ever been disciplined for violating the confidential information policy (Tr. 382).

b. Electronic communications policy

Argos maintains an electronic communications policy at all of its facilities (Tr. 68-69; GC Exh. 4). The policy provides that "(1) the E-mail system and all information transmitted by, received from, or stored in that system are the property of Argos, (2) the system is to be used for business purposes and not for personal purposes, and (3) [employees] have no expectation of privacy in connection with the use of the Electronic Communications or with the transmission, receipt, or storage of information in that system" (GC Exh. 4).

Kennedy testified, without contradiction, that the drivers in South Florida do not have access to Argos' email system (Tr. 381). Kennedy further testified that, during his tenure as a

manager, no employees have ever been disciplined for violating the electronic communications policy (Tr. 382).

c. Cell phone policy[8]

Respondent maintains a cell phone policy at all of its facilities. The policy prohibits the use or possession of cell phones in the cab of a commercial and/or heavy equipment vehicle, defined as having a gross vehicle weight of over 10,000 lbs. (Tr. 66, 74, 80-81, 439-440; GC Exh. 2; GC Exh. 5, pp. 6-7.)[9] At Argos-Florida, Respondent maintains a consistent practice of automatically suspending anyone suspected of violating the cell phone policy pending an investigation, and then terminating them if the investigation reveals a policy violation (Tr. 273, 283, 285, 323, 406-407).

5. Ready Mix Trucks

Argos' ready mix trucks are commercial vehicles with a rotating drum that carries up to 10 yards of mixed concrete (Tr. 74, 91). Drivers are required to maintain at least a Class B license to operate a ready mix truck (Tr. 91). Each unloaded truck weighs between 28,000 and 29,000 pounds. Loaded with 10 yards of concrete, each truck weighs approximately 70,000 pounds, which is equivalent to the weight of a semi-tractor trailer truck. (Tr. 74, 264, 342.)

[8] Respondent maintains a "Cell Phone Policy while operating a Vehicle" (GC Exh. 5, pp. 6-7) and a "Cellular Telephone Acknowledgment" (GC Exh. 2), both of which are alleged to be unlawful (GC Exh. 1(j), ¶¶ 6, 9). Because counsel for the General Counsel's theory is that both documents are unlawful to the extent they prohibit employees from possessing cell phones in commercial vehicles, see ALJD p. 18, lines 12-16, they will be collectively referred to in this brief as Respondent's "cell phone policy," unless otherwise indicated.

[9] HR Director Beer testified that Argos' "Cellular Telephone Acknowledgement" is only used in certain areas, including Florida, Texas, Arkansas, and some parts of the Carolinas (Tr. 64-66). General Counsel Exhibit 2 is a copy of the second page of the Cellular Telephone Acknowledgment Excellent signed upon hire. General Counsel Exhibit 5, p. 8 is a copy of the first page of the standard Cellular Telephone Acknowledgment and includes the same language that is on the second page Excellent signed. General Counsel Exhibit 5, pp. 6-7 is a copy of the "Cell Phone Policy while operating a Vehicle."

Once the ready mix trucks are "under power" in the morning, they "don't shut off during the day" (Tr. 310). Each driver is responsible for his own truck. Because the drums are always rotating, drivers are required to stay with their trucks at all times when on a job site. (Tr. 136, 165, 184-185.)

Each ready mix truck is equipped with a Motorola two-way (CB-style) radio, which the driver can use to communicate with central dispatch, customers, the plant supervisor, or with coworkers (Tr. 99-100, 187, 261). Driver Jose Perez testified that drivers can engage in concerted activity via CB radios: "Drivers talk between each other, like this job is bad . . . because we talk to each other about jobsites and customer specifics also" (Tr. 187-188). Perez testified that on "occasions," managers have encouraged drivers to "try to use the radio for work purposes only and try to go to the point and be short" (Tr. 169). However, no one has been disciplined for talking with coworkers about non-business subjects over the radio (Tr. 239, 291).

The ready mix trucks also contain disposable cameras for drivers to use for whatever reasons they want, including photographing accidents or safety hazards (Tr. 263, 296). Managers do not monitor the drivers' use of the cameras, and drivers are not required to turn in pictures they may take. If a driver uses a camera and needs another one, it is simply replaced with no questions asked. (Tr. 297-298.)

6. Naples Plant Daily Work Routine

Naples plant drivers call a telephone number each evening to learn what their schedule will be for the following day. Their starting times can range from 1:00 a.m. to 9:00 a.m. (Tr. 91-92, 158.) The length of each work day can vary, depending on customer orders and staffing availability (Tr. 341).

When drivers arrive at the Naples plant, they park their personal vehicles in the parking lot and clock in for their shift in the driver breakroom, which is on the first floor of the "batch house"

(R. Exh. 1, p. 9; Tr. 104, 254, 257). On the second floor of the building, the plant supervisor receives orders and "batches" concrete loads for customers (Tr. 247-248, 336), which are then assigned to individual drivers (Tr. 93, 248). Drivers receive their first, and subsequent, assigned deliveries through a simple process—a written ticket is clipped to a string and lowered down a hole between the upstairs (where the supervisor does the batching) and the downstairs breakroom (Tr. 259-260).

The breakroom is equipped with a coffee maker, a microwave, air conditioning, and a bathroom (Tr. 128, 258-259). It also includes chairs for drivers, a bulletin board area, and a time clock (Tr. 128, 254, 257). When drivers first arrive in the mornings, they congregate in the breakroom and talk with one another while waiting for their first loads (Tr. 125, 130, 143, 152). According to Excellent, morning waits can be as long as one hour (Tr. 130, 142).

Excellent testified that his normal routine, after arriving for work, was to take his food and his cell phone to the breakroom and clock in (Tr. 104). He further testified that, while in the breakroom and outside on the plant grounds, he uses his cell phone to call others, and he and others can speak directly to other drivers who are also waiting (Tr. 143, 152).

Once a driver receives his first ticket of the day, he reports to his truck and drives it under the plant where concrete is loaded from the plant into his truck's mixer drum (R. Exh. 1, p. 9). After the truck is loaded, the driver pulls it forward a few hundred feet to the slump rack, where he makes a visual, as well as a gauge, inspection of each mixer load's slump from a platform to determine if additional water needs to be added (Tr. 94, 160, 248-249).[10] The slump rack is an elevated structure that allows a driver to climb up to a position above his mixer so he can look into his mixer's load to determine if the slump needs any adjustment (Tr. 94, 248-249).

[10] "Slump" refers to the consistency of the materials (Tr. 94). The driver must ensure the slump is within the proper range based on the customer's order (Tr. 255-256).

When the driver is satisfied that the load's tested slump is correct, he leaves the plant and delivers the load to the customer (Tr. 248-249). There are many variables that can impact how long each round trip to a customer's site can take, including customer delays, traffic, and weather (Tr. 94-95, 162, 164, 183). However, the average trip for drivers at the Naples plant is two hours, while the average number of loads a driver may "turn" each day ranges from four to five (Tr. 93, 109, 182, 365).[11]

Excellent testified that he was frequently assigned four- and five-hour trips (Tr. 132). However, a driver utilization report Respondent introduced into evidence revealed that his average trip time between March 2016 and March 2017 was 2.1 hours, and he had no 6-hour trips, three 5-hour trips, and only ten 4-hour trips the entire period (R. Exh. 10).[12] Driver Perez confirmed that four- and five-hour trips were rare (Tr. 162-163). Because each driver is paid on a per load basis, the more efficiently a driver can deliver each load and return for another one, the more money he will be paid (Tr. 92, 183, 340).

Upon returning from the first turn of the day, drivers park and exit their trucks, take needed breaks, and retrieve new tickets for their next load (Tr. 112, 373). According to Excellent, "you can get a ticket right away, [or] you can stay 1 hour, 2 hours, and don't get another one" (Tr. 141). Assuming an average day with four total turns, drivers are back at the plant for at least three intervals between each return and reload. Even using a conservative estimate of 20 to 30 minutes

[11] During her opening statement, counsel for the General Counsel wrongly foreshadowed that the evidence would prove drivers were regularly away from the plant for "lengthy periods," thereby supporting her theory that they were denied the ability to communicate with each other and/or the Union during non-working time (Tr. 46). The record did not support counsel for the General Counsel's proclamation.

[12] The judge discredited Excellent, in part, because he "had a tendency to exaggerate details of his work such as the frequency of being assigned deliveries with turnaround times of more than 4 hours when company records and the testimony of another driver do not support such claims" (ALJD p. 9, lines 19-22).

per interval, based on all witness' estimates, drivers are on plant grounds for 60 to 90 minutes each day.

For Excellent, his return trips between turns provide ample time, after each of his average 2.1 hour trips, to eat, relax, use the bathroom, talk with other drivers, and use his cell phone, as he readily confirmed (Tr. 104, 110, 143, 152-153).

7. Excellent's Suspension and Discharge

Excellent was suspended on March 3, and then discharged on April 28, for violating Respondent's cell phone policy on March 3.

a. Events of March 3

Respondent's records establish that on March 3, Excellent clocked in at 6:17 a.m., left the plant for his first delivery at 6:43 a.m., and returned to the plant from his first delivery at 8:07 a.m. He then reloaded his truck at the slump rack and left the plant with his second delivery of the day at 8:28 a.m. He returned to the plant from his second delivery at 10:04 a.m. (R. Exh. 10, pp. 26(a) and 26(b).)

Driver Keith Chadwick pulled into the slump rack immediately after Excellent left the rack to deliver his second load.[13] When Chadwick exited his truck at the rack to perform his inspection, he discovered Excellent's cell phone on the ground around the front left tire near the driver's side door, which would have been at the same location as Excellent's driver's side door when he was parked there minutes before (Tr. 269).[14] Chadwick immediately turned Excellent's phone into Supervisor Johnson (Tr. 406).

[13] The complaint alleged that Chadwick was a Sec. 2(11) supervisor (GC Exh. 1(j), ¶ 4); however, the unrefuted evidence establishes that Chadwick was a unit employee (Tr. 346, 397).

[14] The trucks are all the same size and generally park in the same location in the slump rack (Tr. 270).

Johnson called District Manager Kennedy to tell him about the cell phone, and Kennedy in turn called Division Manager Marion. Because they were working nearby, Kennedy and Marion met and drove together to the Naples plant to investigate. (Tr. 266, 345.) Kennedy and Marion briefly met with Johnson when they arrived at the plant and then summoned Excellent, who had just returned from his second delivery, to the upstairs office (Tr. 267-268, 347).[15]

Excellent reported to the upstairs office and met with Johnson, Marion, Kennedy, and another driver, Ally Millien, who served as a witness (Tr. 144-145, 267-268, 347-348). The meeting lasted approximately 10 minutes, and Marion was the only one who asked questions (Tr. 268, 348). Marion recalled asking Excellent if he knew where his cell phone had been found, which by that time he did (Tr. 268-269). Marion then asked Excellent why he had his phone in that location, and Excellent responded that he always has his phone in his pocket (Tr. 270-271). Obviously troubled by that response given Respondent's cell phone policy, Marion asked Excellent to clarify. According to Marion, Excellent "got a little flustered and didn't really have a good answer . . . as to why he always has his phone in his pocket" (Tr. 271).

Based on Excellent's admissions and the location where his cell phone was found, Marion informed Excellent he was being suspended pending further investigation (Tr. 271-273, 285,

[15] Excellent testified that he must have dropped his phone while walking from his car to the breakroom and that Johnson was not concerned about it (Tr. 104-110). As explained above, however, the judge did not credit Excellent's version of events, finding it "inconsistent with the record as a whole." The judge observed that Excellent "had a tendency to exaggerate details" and that the "tone of [his] voice evidenced animosity that likely influenced his perception or accurate recollection of the events." She further observed that "[o]ther portions of his testimony were simply inaccurate" and "implausible." (ALJD p. 9.) Despite wholly discrediting Excellent, the judge inexcusably failed to conclude that he lied to Respondent about whether he used his cell phone while operating his ready mix truck on March 3, thereby violating the undisputedly *lawful* portion of Respondent's cell phone policy.

349).[16] Excellent immediately clocked out and left the plant (Tr. 146). Later that day, Kennedy called Excellent and told him not to come into work the following work day and that he would call him on Monday, March 6, with an update on the investigation (Tr. 114-115, 352).

b. Request for cell phone records

On March 6, Kennedy called Excellent and told him that the investigation was ongoing and asked him if he would provide copies of his cell phone records to show that he had not used his phone while operating his truck (Tr. 115-116, 147, 352-353). Kennedy testified that he was "one hundred percent" interested in having Excellent back as a driver and that the purpose of requesting his cell phone records was only to show that he had not used his phone while operating his truck (Tr. 353). Excellent replied, "No, you're not a police officer" (Tr. 115). He then told Kennedy not to call him again and to either text him or call the Union (Tr. 116).

c. Bargaining with the Union

On March 8, HR Director Beer emailed Union representative Andrei Rolle to notify him that Excellent had been suspended pending investigation following the discovery of his cell phone in the slump rack area (Tr. 193-194, 407; GC Exh. 8). Beer stated in his email that "Excellent could not (or choose (sic) not to) explain how his phone ended up on the yard in the mixer traffic area" (GC Exh. 8). Beer further stated in his email that "[p]er past practice, . . . Excellent was suspended pending investigation" and that "[a]s part of [the] investigation . . . management . . . requested copies of his cell phone records for the last 2 months to confirm he hadn't been using

[16] Marion, Kennedy, and Beer consistently testified that Argos-Florida's standard practice when presented with evidence of potential violations of the cell phone policy is to suspend the employee pending an investigation (Tr. 273, 283, 285, 323, 406-407).

his phone while operating a mixer truck, which the phone records would easily demonstrate" (GC Exh. 8).[17]

Rolle called Beer a short time later to follow up on Beer's email. Rolle asked Beer what Respondent was going to do and whether Respondent could prove that Excellent had used his phone while operating his truck. Beer explained to Rolle that Respondent's production utilization records would show when Excellent was operating his truck, and if they could compare those records against Excellent's cell phone records, they would "know exactly . . . whether or not he was using his phone during that time frame." Beer told Rolle that his managers wanted to bring Excellent back if they were assured he was not using his phone while operating his truck. (Tr. 408.)

On March 9, Beer sent Rolle copies of Excellent's driver utilization report for January 1 to March 3, which reflected when Excellent left and returned to the plant each day in his truck (Tr. 413; R. Exh. 11(a)). Beer also reminded Rolle that, as part of the investigation, Respondent was asking for Excellent's cell phone records "to confirm he hadn't been using his phone while operating a mixer truck . . ." (R. Exh. 11(a), p. 1).

During the ensuing seven weeks, Beer and Rolle communicated multiple times over Excellent's potential discipline for violating Respondent's cell phone policy (R. Exh. 11(b)-(l); Tr. 408). Beer repeatedly assured Rolle that Excellent's phone records would only be reviewed for those specific times when Excellent was in his truck cab or working at a site. Beer also made

[17] The record reflects another instance where Respondent requested the cell phone records of a driver to establish that he had not been using his phone while away from the plant on a delivery. The driver provided the records as requested, and he was ultimately discharged because the records confirmed he had used his phone. (R. Exh. 16; Tr. 429-430.)

several concessions to Rolle on the total number of phone records to be provided and the deadline to provide them. (R. Exh. 11(c), (h), (i), (k); Tr. 416.)[18]

d. Excellent's discharge

Ultimately, both Excellent and the Union refused to produce the limited cell phone records Respondent requested.[19] As a result, after nearly two months of negotiations, Respondent was forced to act on the evidence it had and discharged Excellent on April 28 (GC Exh. 6).

II. QUESTIONS PRESENTED

1. Whether the judge erred in concluding that Respondent's confidential information and cell phone policies were unlawful under *Boeing*. (Exceptions 1-5, 8-15, 21-41, 50-75, 97, 101-102.)

2. Whether the judge erred in concluding that Respondent's electronic communications policy was unlawful under *Purple Communications*. (Exceptions 1-2, 6-7, 25, 42-49, 97, 101-102.)

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[18] Respondent's cell phone policy provides that Respondent reserves the right to look at a driver's cell phone call history if the driver is involved in an accident (GC Exh. 5, p. 6). During the negotiations over Excellent's discipline, Rolle repeatedly argued that Excellent's cell phone records need not be produced because he was not in an accident (GC Exh. 11(b), (d), (i), (j)). Rolle clearly misunderstood the point of Respondent's request. As Beer explained, Respondent never asserted that it had a *right* to see Excellent's cell phone records; rather, Respondent asked for the records to confirm Excellent had not used his phone while operating his truck (Tr. 412).

[19] In fact, Excellent even refused to provide his cell phone records in response to a subpoena Respondent issued prior to the hearing in this case, and no petition to revoke was filed. Counsel for the General Counsel argued at the hearing that the cell phone records were irrelevant because Respondent did not have them at the time it suspended and terminated Excellent. Respondent argued that, at a minimum, an adverse inference should be drawn against Excellent based on his failure to provide the records in response to the subpoena. (Tr. 23-32.) The judge never squarely addressed the issue of Excellent's failure to provide his cell phone records in response to Respondent's subpoena; however, her decision not to credit Excellent appeared to be based, in part, on his failure to provide the records during the investigation of his suspected misconduct (ALJD p. 10, lines 1-4). As explained more fully below at Section III.B.2., the judge should have gone further than simply not crediting Excellent's testimony based on his failure to provide the records. The judge should have found that Excellent's refusal to provide the records during the investigation supported the conclusion that his suspension and discharge were lawful, even if based on an overbroad cell phone policy.

3. Whether the judge erred in concluding that Respondent unlawfully suspended and discharged Excellent pursuant to its cell phone policy. (Exceptions 16-18, 23, 76-80, 96, 98, 100-102.)

4. Whether the judge erred in concluding that Respondent unlawfully failed to give the Union notice and an opportunity to bargain before suspending Excellent. (Exceptions 13, 16-20, 81-95, 99, 101-102.)

III. LEGAL ARGUMENT

A. ARGOS' POLICIES

The judge's findings of fact and conclusions of law with respect to Respondent's policies are erroneous, as set forth below.

1. *Boeing* Standard

The Board in *Boeing* adopted a new standard for evaluating the legality of employer policies, rules, and handbook provisions.[20] Under the new standard, "when evaluating a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, *and* (ii) legitimate justifications associated with the rule." *Boeing*, above at 3 (emphasis in original). The Board conducts the evaluation consistent with its "'duty to strike the *proper balance* between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy' focusing on the perspective of employees . . . ." Id. (emphasis in original) (quoting *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33-34 (1967)).

[20] *Boeing* expressly overruled the "reasonably construe" standard set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004), because, inter alia, that standard entailed "a single-minded consideration of NLRA-protected rights, without taking into account any legitimate justifications associated with policies, rules and handbook provisions." *Boeing*, above at 2.

Under *Boeing*, the Board "may differentiate among different types of NLRA-protected activities (some of which might be deemed central to the Act and others more peripheral)" and "draw reasonable distinctions between or among different industries and work settings." Id. at 15. The Board further explained that it "may also take into consideration particular events that may shed light on the purpose or purposes served by a challenged rule or on the impact of its maintenance on protected rights." Id. at 15-16.

2. Confidential Information Policy

The judge concluded that Respondent's confidential information policy is unlawful under *Boeing* because 1) a "reasonable employee" would interpret the term "earnings" to include "employee wages," and would interpret the term "employee information" to include "a broad range of information about employees, such as names, addresses, phone numbers, wages, raises, benefits, promotions, discipline, etc." (ALJD p. 15), and 2) Respondent's "interests are not demonstratively furthered by prohibiting employees from discussing or sharing employee information including employee earnings" (ALJD p. 16).

a. Respondent's confidential information policy, when reasonably interpreted, would not potentially interfere with the exercise of NLRA rights.

The judge's finding that Respondent's confidential information policy, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights fails to take into account the very specific context surrounding the terms "earnings" and "employee information." Even under pre-*Boeing* precedent, the Board declined to consider words and phrases in a challenged rule in isolation.

For example, in *Mediaone of Greater Florida, Inc.*, 340 NLRB 277, 279 (2003), the Board held that the phrase "employee information" did not render the employer's confidentiality policy unlawful, given that the phrase appeared within a larger provision prohibiting the disclosure of proprietary information, including information assets and intellectual property. The Board

explained that "employees, *reading the rule as a whole*, would reasonably understand that it was designed to protect the confidentiality of the respondent's proprietary business information rather than to prohibit discussion of employee wages." Id. (emphasis added). In reaching its conclusion, the Board distinguished *University Medical Center*, 335 NLRB 1318, 1322 (2001), on the basis that "[t]he rule [at] issue there consisted of a one-sentence prohibition on the disclosure of 'confidential information concerning patients or employees,' and lacked any examples clarifying that the rule was limited to protecting the confidentiality of the respondent's proprietary information." Id. at fn. 7.

When read in context—consistent with well-settled Board precedent—the single word "earnings," and the phrase "employee information," do not render Respondent's confidential information policy unlawful. To begin with, the first paragraph of the Employee Confidential Information Agreement plainly announces that the policy is intended to protect against the use and disclosure of sensitive, proprietary company information employees might one day be privy to, rather than information about their own wages, benefits, and other unstated terms and conditions of employment.

The first sentence of the first paragraph of the agreement provides, "I understand that during the course of my employment I *may receive and obtain access* to confidential Company information" (GC Exh. 3) (emphasis added). Reasonable employees would not read that sentence to mean they *might one day* "receive and obtain access" to information about their own or others' wages, benefits, or terms and conditions of employment. Obviously employees "receive" information about those subjects upon hire, and they never have to "obtain access" to it.

The second sentence of the first paragraph further informs employees of the actual scope of the prohibition. It provides that employees may only use confidential information "for purposes

of carrying out Argos' business" (GC Exh. 3). Reasonable employees would understand that obtaining a loan (which requires the use of wage information), or securing medical treatment (which requires the use of benefits information), for examples, are not "carrying out Argos' business." Accordingly, they would understand the policy does not extend to that type of information.

The definition of "confidential information," in the second paragraph of the policy, adds further clarity to the issue. "Confidential information" is defined at the outset to include "all private information not generally known in the industry and not readily available, written or otherwise . . ." (GC Exh. 3). Reasonable employees would not think of their wages, benefits, and other terms and conditions of employment as being "not generally known in the industry and not readily available." Indeed, the mere reference to "industry" clearly signals an intent to protect against the use and disclosure of proprietary information that would be harmful if it fell into the hands of Respondent's competitors.

The definition goes on to list approximately 25 examples of the types of information covered. The judge found that two of those examples plucked from the list—"earnings" and "employee information"—are overbroad and render the policy unlawful. However, when read in context with the many surrounding words and phrases, reasonable employees would not conclude that the word "earnings" might refer to their wages,[21] or that the phrase "employee information" might refer to their address, phone number, etc.

[21] It is quite a dubious proposition to begin with that employees would equate the word "earnings"—even standing alone—with their wages rather than Respondent's profits. The word "earnings" commonly refers to the financial status of a business. See Wikipedia, *Earnings* (https://en.wikipedia.org/wiki/Earnings) (last viewed July 12, 2019) ("Earnings are the net benefits of a corporation's operation."). Moreover, the Act fails to mention "earnings" but frequently refers to "wages" and "rates of pay," suggesting that even the drafters did not contemplate that "earnings" was synonymous with those terms. See, e.g., 29 U.S.C. § 152(5) ("The term 'labor organization' means any organization . . . in which employees participate and which exists for the purpose, in

Every other example in the definition of "confidential information" list relates only to sensitive, proprietary information that, if used or disclosed improperly, could give Argos' competitors unfair advantages. Information concerning Argos' customers' "buying habits," or about Argos' "non-published prices," "marketing and/or supply strategies," or "business arrangements," for instance, could allow a competitor to undercut Argos in the marketplace. An employee disclosing to a coworker or a union representative that he makes $15.00/hr. carries no such concerns.

Properly interpreting the words "earnings" and "employee information" as only including information of a sensitive, proprietary nature, based on the many surrounding words, is also consistent with the established doctrine of *noscitur a sociis*, which the Board has recognized and applied to give meaning to ambiguous terms. See, e.g., *District 1199, National Union of Hospital and Health Care Employees*, 232 NLRB 443, 444 fn. 8 (1977) (recognizing that "the doctrine of *noscitur a sociis* . . . holds that the meaning of doubtful words may be determined by reference to their association with other associated words . . ."); *Schwans Home Service, Inc.*, 356 NLRB No. 20, slip op. at 19 fn. 20 (2016) (Member Miscimarra, concurring in part and dissenting in part) ("Under the principle of *noscitur a sociis*, the meaning of an unclear word or phrase may be known from accompanying words."), abrogated by *Boeing*.[22]

whole or in part, of dealing with employers concerning grievances, labor disputes, *wages, rates of pay*, hours of employment, or conditions of work.") (emphasis added); 29 U.S.C. § 158(d) ("[T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to *wages*, hours, and other terms and conditions of employment . . . .") (emphasis added).

[22] Applying the principle of *noscitur a sociis*, then-Member Miscimarra reasoned in *Schwans* that "[t]he inclusion of a general prohibition on 'conduct . . . detrimental to the best interests of the company' among more specific prohibitions of particular conflicts of interest clearly indicates that 'detrimental conduct' is intended to encompass similar conflict-of-interest situations not specifically listed." *Schwans*, above at 19.

To erase any doubt about whether a reasonable employee would read two terms out of approximately 25 in the confidential information policy as prohibiting them from discussing or disclosing information about their wages, benefits, or other terms and conditions of employment, the final paragraph of the policy expressly provides, "I have the right to consult with counsel of my own choosing before signing this Agreement should I have any questions about the obligations or material contained in this Agreement" (GC Exh. 3). Thus, if employees have even the slightest hesitation about signing the agreement out of fear that signing may prohibit them from talking to coworkers or a union about subjects protected by the Act, they can ask an attorney whether the agreement lawfully prohibits such conduct.

The judge failed to conduct a proper contextual analysis of the confidential information policy. As explained, she completely ignored the first paragraph of the policy, which sets the stage for the remainder of the document by referring only to confidential information employees "may receive and obtain access to" during their employment, and limiting employee use of confidential information to the purposes of "carrying out Argos' business" (GC Exh. 3). She then ignored the maxim that words in a list should take on meaning based on their association with surrounding words. Instead, she improperly applied contrary reasoning and found that "employee information" "sticks out as not being related to the other terms" (ALJD p. 15, line 30).

The judge compounds her errors by faulting Respondent for not expressly limiting the rule "to more sensitive employee information" and "to employees who have knowledge of such information solely from access to employee files which contain personal information such as bank account and social security numbers, medical information, etc." (ALJD p. 16, lines 1-4). She also faults Respondent for not providing specific "exceptions to the confidentiality rule" (ALJD p. 16, lines 6-9). The *Boeing* majority, however, rejected the use of such logic when analyzing employer

rules. See *Boeing*, above at 9 fn. 41 ("Linguistic perfection has not been required in other types of employment provisions enforced by the Board and the courts."), fn. 42 ("Nobody can reasonably suggest that employers can incorporate into policies, rules and handbooks the precise contours of Sec. 7 protections . . . ."), fn. 92 ("[I]t is impossible to craft reasonable rules and policies addressing a range of issues without having some ambiguity and potential overlap with one or more types of possible NLRA-protected conduct.").

Contrary to the judge's conclusion, the mere possibility that Respondent could have more narrowly tailored its confidential information policy—by excluding the words "earnings" and "employee information," by explaining in more extensive detail what those terms were intended to include, and/or by providing specific exceptions to what is prohibited—does not support her conclusion that the policy, as written, is unlawful. See *Boeing*, above at 20 fn. 90 (rejecting dissent's suggestion that a rule is unlawful if a "more narrowly tailored rule" could have accommodated the employer's interests and recognizing that "it is impossible to craft reasonable workplace rules to the exacting standard our dissenting colleague demands").[23]

b. Respondent's legitimate business justifications outweigh any potential interference with the exercise of NLRA rights.

Even accepting the judge's opinion that a "reasonable employee" would interpret the terms "earnings" and "employee information" as potentially interfering with the exercise of NLRA rights, her attendant conclusion, that Respondent's "interests are not demonstratively furthered by prohibiting employees from discussing or sharing employee information including employee

[23] The judge's reliance on *Flex Frac Logistics*, 358 NLRB 1131 (2012), is misdirected (ALJD p. 16, lines 12-17). First, the Board analyzed the confidential information rule in *Flex Frac* under the *Lutheran Heritage* standard, which *Boeing* expressly rejected. Second, the rule in *Flex Frac* defined confidential information as including, among other things, "personnel information and documents." Id. at 1131. Respondent's confidential information policy does not cover "personnel information," which clearly relates to wages, hours, and other terms and conditions of employment.

earnings"(ALJD p. 16), should nevertheless be rejected. The judge once again erroneously focuses on whether Respondent's policy is sufficiently "narrowly tailored" to accommodate its interests. See ALJD p. 16, lines 34-36 ("In some circumstances, employers may have a duty to prevent employees with access to human resource files from divulging certain employee information such as medical information, *but Respondent's rule is not narrowly tailored to address this concern.*") (emphasis added).

As explained above, the *Boeing* majority squarely rejected the dissent's belief that "a challenged rule's justifications should be taken into account for the sole purpose of determining whether they can be accommodated by a more narrowly tailored rule." *Boeing*, above at 20 fn. 90. Yet, that is precisely what the judge did here by substituting her own judgment for that of Respondent to conclude that, on balance, employees' Section 7 rights outweigh Respondent's legitimate justifications for including the proprietary terms "earnings" and "employee information" in its definition of confidential information.

3. Cell Phone Policy

The judge found, that while Respondent's cell phone policy is "facially neutral," it "effectively prevents" employees from "discussing, photographing or recording information about their terms and conditions of employment" while away from the facility (ALJD p. 18, lines 35-37). Consequently, she proceeded to *Boeing*'s balancing test and concluded that "employees' Section 7 rights to communicate with other employees and union representatives and to take pictures or recordings of their terms or conditions of work during the majority of their workday outweighs Respondent's asserted business justification for the total ban on the possession of a cell phone in its commercial vehicles/ready-mix trucks" (ALJD p. 21, lines 6-9). The judge misapplied *Boeing* to reach this result.

a. Respondent's cell phone policy, when reasonably interpreted, would not potentially interfere with the exercise of NLRA rights.

Respondent's cell phone policy is not unlawful under *Boeing* because the policy, when reasonably interpreted, would not potentially interfere with the exercise of NLRA rights. There is no dispute that employees have a Section 7 right to communicate with each other at work about terms and conditions of employment. See *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 491 (1978) ("We have long accepted the Board's view that . . . [Section] 7 . . . necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite."). However, employees do *not* have the right to communicate with each other during *working time*. See *Boeing*, above at 8 fn. 30 ("Working time is for work.") (quoting *Peyton Packing Co.*, 49 NLRB 828, 843 (1943), enfd. 142 F.3d 1009 (5th Cir. 1944), cert. denied 323 U.S. 730 (1944)).

Contrary to the judge's conclusion, Respondent's cell phone policy, when reasonably interpreted, only prohibits the use or possession of cell phones during *working time*. The record evidence establishes that drivers only operate their ready mix trucks (and are therefore only subject to the no-cell phone restriction) during *working time*. Once a driver receives his first ticket of the day, he reports to his truck and drives it under the plant where concrete is loaded. He then drives it to the slump rack where he inspects and, if necessary, adjusts the composition of the load. Next he drives to a job site and delivers the product. (Tr. 94, 160, 248-249.)

While there may be some time at a job site when the driver is out of his truck, that does not equate to non-working "break time." Importantly, Argos' trucks are always in operation at the job site, because the drum is always rotating to preserve the consistency of the concrete. Consequently, drivers are responsible for, and must stay with, their trucks at all times to, from, and when at a job site. (Tr. 136, 165, 184-185, 310.) The judge ignores this critical testimony and mistakenly presumes that Argos' ready mix drivers are akin to delivery drivers in other industries who take

breaks (i.e., have non-working time) while on the road because, unlike Argos' drivers, they may leave their warehouse at 5:00 a.m. and not return until 5:00 p.m., after delivering their products.[24]

Respondent's ready mix drivers are more akin to machine operators who—perhaps as long as three to four hours at a time—have to monitor and operate production equipment. The Board certainly would not conclude that these employees have a Section 7 right to possess or use their cell phones while operating presses or cranes. Nor would the Board empathize with the fact that the press and crane operators cannot communicate with their coworkers during the majority of their day.

The judge's conclusion is also premised on the erroneous belief that employees have a statutory right to possess and/or use cell phones. They do not. Section 7 provides, in pertinent part, that "[e]mployees shall have the right . . . to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. Section 7 does *not* provide employees any rights to engage in protected activity through particular mediums. See *NLRB v. United Steelworkers of America (Nutone)*, 357 U.S. 357, 364 (1958) ("[The Act] does not command that labor organizations as a matter of abstract law, under all circumstances, be protected in the use of every possible means of reaching the minds of individual workers . . . ."); *Guardian Industries Corp. v. NLRB*, 49 F.3d 317, 318 (7th Cir. 1995) ("Section 7 of the Act protects organizational rights . . . rather than particular means by which employees may seek to communicate.").

[24] The judge highlights her mistaken presumption by declaring that Respondent's "employees . . . regularly take breaks away from the facility . . ." (ALJD p. 19, line 35). There is absolutely no evidence to support this bold assertion. Because the average turn time is two hours, drivers regularly take their breaks at the facility between turns. And on the rare occasion when a driver uses the radio to announce a 10-7 "quick break" while on the road (Tr. 102-103)—which Excellent testified to doing once a day (Tr. 103), and driver Perez testified to doing "maybe once a month" (Tr. 171)—the driver is still responsible for his truck, which remains "under power" all day (Tr. 310).

Accordingly, the mere fact that employees cannot use or possess their personal cell phones to talk with each other or a union or to take pictures or recordings related to their terms and conditions of employment while away from the facility for an average of two hours at a time does not mean there is potential interference with NLRA rights. Even if it did, the record amply reflects that drivers are able to communicate with each other while away from the facility using CB radios, and they can take pictures while away from the facility using disposable cameras.

Excellent testified that he personally used the CB radio in his truck to communicate with coworkers "every day" (Tr. 101). Perez similarly confirmed that drivers regularly communicate over the CB radios (Tr. 168, 187). The judge discounted this evidence because the CB radios are "constantly monitored" by Respondent's management (ALJD p. 19, lines 5), and Respondent attempts to limit communications to those regarding "the current stage of or complications with work" (ALJD p. 19, lines 9-10).

As to the first issue, the judge misstates the record. While managers monitor some radio communications, they do not listen to every statement or comment. As Division Manager Marion testified, dispatchers primarily monitor radio chatter "looking for the communication piece for business and that's really it" (Tr. 311). Additionally, the judge's professed concern that monitoring may *chill* protected activity was addressed and disposed of in *Purple Communications*. The Board there recognized that employees who are granted access to their employer's email system have a right to use it during nonworking time for Section 7 purposes notwithstanding that their employer can monitor their communications. See *Purple Communications*, 361 NLRB at 1064 ("Our decision does not prevent employers from continuing, as many already do, to monitor their computers and email systems for legitimate management reasons, such as ensuring productivity and preventing email use for purposes of harassment or other activities that could give rise to

employer liability."). In other words, the Board in *Purple Communications* believed that employees could effectively exercise their Section 7 rights notwithstanding that their employers could monitor their communications.

As to the issue of Respondent's efforts to limit communications over the CB radios, the record reflects that such efforts were not geared towards limiting the *subjects* of those communications but rather the extent to which they tied up the band frequency or otherwise interrupted business. General Counsel's Exhibit 14, for example, involved an email from District Manager Kennedy regarding a situation where an employee was interfering with the radio frequency by "keying the mic" and "playing obscene music" (Tr. 313). There is no evidence that employees were disciplined for or otherwise discouraged from communicating with each other over the radio about their terms and conditions of employment. Again, *Purple Communications* is instructive because the Board recognized that nothing in its ruling prohibited employers from placing limitations on email communications that "would interfere with the email system's efficient functioning." *Purple Communications*, above at 1064.

The judge also rejected Respondent's argument that disposable cameras, always available in each truck, are sufficient to alleviate any concerns that the cell phone policy potentially interferes with an alleged protected right to take pictures while away from the facility. According to the judge, employees are unlikely to use the cameras in furtherance of Section 7 rights "because Respondent has not informed employees that they are free to use them for any other purposes [besides taking pictures of accidents or situations involving the trucks] without any repercussions or questions" (ALJD p. 19, lines 16-19). Moreover, the judge found, even if Respondent had so informed employees, "it would put [employees] in the uncomfortable position of asking for replacement cameras if they opted to use the company provided camera for documenting terms

and conditions of work that they wanted to share with other employees or a union representative but not Respondent" (ALJD p. 19, lines 19-22). Both of these assertions are unconvincing.

First, there is no evidence to support the judge's personal opinion that employees are "unlikely" to use the cameras merely because Respondent has not informed them they can be used for purposes other than taking pictures of accidents or truck issues. Counsel for the General Counsel, whose burden it is to prove a violation, failed to elicit any testimony to that effect. See *Boeing*, above at 15 ("Parties may . . . introduce evidence regarding a particular rule's impact on protected rights . . . ."). Moreover, as described above at Section I.B.5., the only record evidence is that employees can use the cameras for any purpose, including Section 7 purposes.

Second, the record flatly contradicts the judge's assumption that employees would be "uncomfortable" using the cameras because they might have to request a replacement. Marion's uncontradicted testimony was that Argos maintains a "no questions asked" policy with respect to requests to replace disposable cameras (Tr. 297-298). The judge cannot simply disregard this unrefuted testimony and make baseless assumptions to support her conclusion.

In sum, Respondent's cell phone policy, when reasonably interpreted, prohibits employees from possessing and/or using their cell phones *only during working time*. To the extent the prohibition arguably extends to nonworking time, employees have alternative mediums through which to exercise their Section 7 rights. Moreover, employees have ample time between deliveries to engage in Section 7 activity at the plant. Consequently, there is no potential interference with NLRA rights under *Boeing*.[25]

[25] The *Boeing* Board also found it significant that, as here, there was "no allegation that [the] no-camera rule has actually interfered with any type of Section 7 activity, nor is there any evidence that the rule prevented employees from engaging in protected activity." *Boeing*, above at 19.

b. Respondent's legitimate business justifications outweigh any potential interference with the exercise of NLRA rights.

Even assuming the cell phone policy, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, Respondent's legitimate business justifications associated with the policy far outweigh any potential interference under *Boeing*. The record is replete with evidence supporting the reasons why Respondent maintains its cell phone policy. At its core, the policy is in effect because "a ready mix truck is a 70,000 pound missile" (Tr. 431).

Due to unrefuted risks and potential liabilities, Argos owes an undeniable duty to its drivers and to the public to ensure its drivers are not distracted from their critical safety responsibilities on the roads and highways. As HR Director Beer emphasized: "If they lose their attention for a moment, they can kill people. The driver could be killed. Families could be killed" (Tr. 431). The judge disregarded *Boeing*'s instruction and, regrettably, discounted substantial evidence on this issue—namely, Beer's poignant testimony about two fatal accidents that supported Argos' continued maintenance of the cell phone policy.[26]

Beer offered detailed testimony about one incident involving an Argos driver named Marek, who was determined to have "reached for his cell phone" while operating his ready mix vehicle, "lost control of the vehicle," and eventually "flipped it." Marek was airlifted to a hospital where he was pronounced "everything but brain dead," and his family made the daunting decision to "pull the plug," resulting in his death. (Tr. 432.)

Beer described another accident involving an Argos driver named Rodriguez, who was killed using his cell phone while driving a ready mix truck. Distracted by cell phone use, Rodriguez left the roadway and crashed at the "bottom of [a] valley." The weight of the fully loaded truck

[26] See *Boeing*, above at 15-16 ("[The Board] may take into account particular events that may shed light on the purpose or purposes served by a challenged rule . . . .").

caused "the drum [to] hit the back of the cab . . . killing him instantly." Beer testified that he and another manager were in "the unfortunate situation of having to notify [the] family" about Rodriguez's death. (Tr. 432-433.)

Apparently unmoved by this testimony, the judge opined that Beer failed to "adequately explain" how "cell phone use contributed to the cause of these accidents" because he did not testify as to how he specifically knew one of the drivers "reached for his cell phone" (ALJD p. 8, lines 40-42). Further, she claimed there was no evidence that the "mere possession" of a cell phone caused the accidents (ALJD p. 8, lines 43-44). Regardless of whether Beer had first-hand knowledge of what caused the accidents, he was obviously convinced that it involved cell phone use, and his belief influenced Respondent to maintain the cell phone policy.

Moreover, Beer's testimony that Marek's accident was caused by him reaching for his cell phone undermines the judge's finding that there was no evidence that the "mere possession" of the cell phone caused the accident. If Marek had complied with Respondent's policy, and not carried his cell phone in his truck, he could not have reached for it.[27] Thus, it is indisputable that Marek's possessing his cell phone in his truck contributed to his accident.

The judge also gratuitously observed that Marek's and Rodriguez's accidents occurred well after Argos' cell phone policy had been instituted and, therefore, could not have been the impetus for enacting it (ALJD p. 9, lines 1-2). Again, the judge misses the mark. The critical issue here is

[27] The judge baselessly and insensitively remarked that "[e]mployees who are willing to risk . . . serious injuries or death of themselves . . . in order to use a cell phone while driving a ready-mix truck are not likely to be deterred by the threat of discipline or discharge for the possession of a cell phone in their truck" (ALJD p. 20, lines 26-29). The threat of discipline or discharge may not deter an employee from accessing a piece of electrical equipment without properly locking out and tagging out, but that does not mean employers should forego lock-out, tag-out policies.

Argos' legitimate reasons for *maintaining* the policy, not for *implementing* it. Beer's unrefuted testimony is highly relevant on that issue.

Of further relevance is Respondent's potential regulatory liability related to driver cell phone use. In 2012, the U.S. Department of Transportation (DOT) issued a complete "cell phone ban" for drivers operating commercial motor vehicles. To enforce the ban, the Federal Motor Carrier Safety Administration (FMCSA) instituted a "final rule" permitting officials to fine individual drivers $2,750 and to disqualify them from possessing a commercial driver's license for using a cell phone in a truck cab or while working, and to fine employers of noncompliant drivers $11,000 for each violation. The rule specifically requires "motor carrier[s] [to] put in place or have company policies or practices that make it clear that a carrier does not allow or require hand-held mobile phone use while driving." (GC Exh. 11.)

While the judge acknowledged this evidence, she only referenced it to support her conclusion that Respondent's cell phone policy is "considerably more restrictive than the FMCSA regulations . . ." (ALJD p. 20, line 2). Like many regulatory agencies, the FMCSA regulations merely establish baseline requirements to which covered employers must adhere. The FMCSA standards *do not* prohibit an employer from instituting rules that completely prohibit cell phones in commercial vehicles. Thus, the fact that Argos' cell phone policy is more restrictive than the FMCSA regulations says nothing about Argos' legitimate business reasons for prohibiting the devices in its trucks.

Moreover, the judge's suggestion that Respondent should have more narrowly tailored its policy to only satisfy the FMCSA baseline regulations once again disregards *Boeing*'s teachings. See *Boeing*, above at 20 fn. 90 (expressly rejecting dissent's suggestion that a rule is unlawful if a "more narrowly tailored rule" could have accommodated the employer's interests).

Compelling statistical evidence published by the National Highway Traffic Safety Administration (NHTSA) regarding cell phone use and highway fatalities further supports Respondent's legitimate business reasons to limit distracted driving. In 2016, there were 34,439 fatal crashes in the United States, 3,157 of which involved distraction (approximately 9% of all fatal crashes). *Distracted Driving 2016*: NHTSA (2016). The judge completely ignored this unrebutted evidence.[28]

In the judge's subjective opinion, although a ban on cell phone *usage* while driving a ready mix truck reasonably furthers Respondent's safety goals, "there is no evidence that the prohibition on the mere presence of a cell phone in the ready-mix trucks furthers this goal" (ALJD p. 20, lines 17-20). Given Respondent's record of fatal accidents, the potential costly regulatory liability for failure to effectively control driver cell phone use, and the unrefuted statistics related to distracted driving fatalities, a ban on cell phone possession in the cabs of ready mix trucks is clearly the most effective way to ensure a driver cannot use his cell phone while operating a truck. Respondent's rationale is simple: if drivers do not possess cell phones in their cabs, they can never be distracted by trying to access them.

In any event, as argued repeatedly above, it is not up to the judge to decide whether and how Respondent's cell phone policy can be more narrowly tailored to accommodate its legitimate business justifications. By substituting her judgment on this issue for that of Respondent, however, that is precisely what the judge does here. She subjectively believes Respondent should be forced

[28] The judge's suggestion that Respondent should have simply adopted the minimum FMCSA standards and restricted only the use of cell phones while driving commercial vehicles insinuates that Respondent should be satisfied with these statistics. If all companies adopted similar policies prohibiting the use *and possession* of cell phones in motor vehicles, one can only imagine how much better these statistics might be.

to re-write its policy to eliminate the restriction on cell phone possession in a truck. Again, extant Board law says it is not up to her.

Under *Boeing*, once the judge determined that Respondent's cell phone policy, when reasonably interpreted, would potentially interfere with Section 7 rights, she was tasked only with evaluating "(i) the nature and extent of the potential impact on NLRA rights, *and* (ii) legitimate justifications associated with the requirement(s)." *Boeing*, above at 14. Like the no-camera policy at issue in *Boeing*, any potential adverse impact that Respondent's cell phone policy might have on NLRA-protected rights is comparatively slight.

The policy does not prevent employees from discussing their wages, benefits, and terms and conditions of employment during nonworking time, whether face-to-face or by personal cell phone. When employees are operating commercial vehicles—which includes the average two hours per trip they are away from the facility at a time—they are on working time. At most, employees may be considered to be "on break" while away from the facility for very brief periods—once a day for 5-10 minutes for Excellent (Tr. 103), and once a month for Perez (Tr. 171). Disregarding the reality that Argos' trucks have to continuously operate during those periods—and drivers remain responsible for the trucks during those periods—any arguable "nonworking time" break during which a driver could use his cell phone to call a coworker or a union representative is de minimis. Moreover, as stated, employees have the ability to use CB radios to talk to coworkers during that time.

As for taking photographs, *Boeing* recognized that "the vast majority of images or videos blocked by [a no-camera] rule do not implicate any NLRA rights." *Boeing*, above at 19. Thus, the judge's exaggerated concerns about drivers being able to "document safety issues or other difficulties on the jobsites or incidents that occur between jobsites and the facility . . . in the

moment" (ALJD p. 20, lines 26-27) are not well-founded. Regardless, any potential interference with a driver's ability to use a camera to photograph Section 7 activity is further assuaged by the disposable cameras required to be maintained in each truck at all times.[29]

On balance, the comparison is not even close. Respondent's legitimate business justifications far outweigh any potential interference with the exercise of NLRA rights.

4. Electronic Communications Policy

Respondent maintains an electronic communications policy providing, in pertinent part, that Respondent's email system "is to be used for business purposes and not for personal purposes" (GC Exh. 4). However, there is no record evidence that any statutory employees have access to Respondent's email system for work purposes.[30] Nevertheless, the judge engaged in unnecessary conjecture by opining that she could "only conclude that there *are some statutory employees* assisting in the operations of a company the size of Respondent's with access to its email system .

[29] The judge claims that Respondent's argument that it allows the use of disposable cameras to document safety and performance issues means it has no legitimate business reason to preclude employees from taking photographs or recordings of their working conditions and, thus, "no justification for why a cell phone could not be used for that purpose . . ." (ALJD p. 20, fn. 17). The judge misunderstands the point. The reason Respondent supplies disposable cameras for employees to use to take pictures of working conditions instead of allowing them to use their cell phones is that, unlike disposable cameras, cell phones do much more than take pictures. Cell phones can also be used to talk and text, and most of them can be used to surf the internet, watch movies, check Facebook, Twitter, Instagram, etc., get directions, make hotel reservations, check the weather, send and receive emails, order groceries, listen to music, check bank accounts, and play games, among a myriad of other uses. It is these potential distractions that further justify Respondent's complete prohibition on the possession of cell phones while operating a "70,000 pound missile" (Tr. 431).

[30] The judge noted that "Respondent provided information concerning only the batch plant employees' lack of access to Respondent's email system and specifically avoided the issue as to whether the rule applied to other statutory employees" (ALJD p. 7, lines 8-11), while acknowledging that "General Counsel failed to solicit evidence about whether other statutory employees . . . have access to Respondent's email system . . ." (ALJD p. 7, lines 5-8). At most the record demonstrates that a backup batcher can access his or her plant supervisor's email account to order materials (Tr. 381-382, 394-396). The only backup batcher at the Naples plant is Keith Chadwick (Tr. 394-395). There is no evidence that Chadwick or any other driver used email for his own work purposes.

. .” (ALJD p. 17, lines 35-38 (emphasis added)). She then observed, “[T]o the extent Respondent’s policy stating that its email system ‘is to be used for business purposes and not for personal purposes,’ is applied to statutory employees with access to the email system, it is a violation of Section 8(a)(1) of the Act” (ALJD p. 18, lines 1-4). The judge’s findings and conclusions can easily be rejected.

First, the judge cannot assume facts not in the record. See *Carpenters Local 2012 (Forcine Concrete & Construction Co.)*, 358 NLRB 325, 325 fn. 1 (2012) (“There is no record evidence to support the judge’s findings that ‘[i]t is reasonably likely that . . . employees’ . . . would become aware of the Respondent’s [alleged unlawful] video . . . and that they would watch the video. Accordingly, in dismissing the complaint, we do not rely on these speculative statements, nor do we rely on the judge’s further speculation concerning how employees would have been affected.”). Consequently, as much as the judge may *suspect* that statutory employees somewhere in Respondent’s organization have access to email, it was highly inappropriate for her to conclude as much.

Second, because there is no record evidence that statutory employees have access to Respondent’s email system for work purposes, *Purple Communications* simply does not apply. Under *Purple Communications*, the Board “will presume *that employees who have rightful access to their employer’s email system in the course of their work* have a right to use the email system to engage in Section 7-protected communications on nonworking time.” 361 NLRB at 1063 (emphasis added). The sine qua non of this holding, of course, is that there must be “employees” who “have rightful access” to an email system in order to have the right to use the system to engage in Section 7 activity. Again, no such evidence exists here.

Third, even if there were record evidence that statutory employees had rightful access to Respondent's email system, *Purple Communications* should be overruled for the reasons set forth by former members Miscimarra and Johnson in their dissents in that case. See *Purple Communications*, above at 1067-1110.[31]

Purple Communications overturned *Register Guard*, 351 NLRB 1110 (2007), enfd. in part and remanded sub nom. *Guard Publishing v. NLRB*, 571 F. 3d 53 (D.C. Cir. 2009). However, *Register Guard* reflects more sound labor policy that appropriately balances employer property interests with employee Section 7 rights. In *Register Guard*, the Board held, in pertinent part, that employees have no statutory right to use their employer's email systems for Section 7 purposes as long as the restrictions are nondiscriminatory. *Id*. at 1114. The majority in *Purple Communications* improperly concluded that *Register Guard* afforded too much protection to employer property rights and too little protection to NLRA-protected employee rights in light of the importance of email as a means of modern workplace communication. *Purple Communications*, above at 1050.

In sum, because there is no record evidence that any of Respondent's statutory employees have access to Respondent's email system in the course of their work, the judge's baseless assumption that some unidentified employees in some unidentified part of Respondent's operation could have access, therefore rendering the policy unlawful, should be rejected. Regardless, *Purple Communications* is premised on unsound labor policy and should be overruled.

[31] The General Counsel is now taking the position in cases concerning the application of *Purple Communications* that the decision should be overruled. See, e.g., *Caesars Entertainment Corporation*, Case 28-CA-060841, Brief of the General Counsel (Sept. 14, 2018) ("The General Counsel hereby withdraws . . . its opposition to the Employer's position and . . . urges the Board to overturn *Purple Communications* and, accordingly, find the Employer's rule lawful."). Respondent anticipates that counsel for the General Counsel will adopt the same position in this case.

B. EXCELLENT'S DISCHARGE

Assuming arguendo that Respondent's cell phone policy is unlawful to the extent it prohibits employees from possessing cell phones in ready mix trucks, the judge nevertheless erred in finding that Excellent's discharge pursuant to the policy was unlawful.[32]

1. Excellent Did Not Engage in Conduct that Implicates the Concerns Underlying Section 7.

In *Continental Group*, 357 NLRB 409, 412 (2011), the Board held that "discipline imposed pursuant to an unlawfully overbroad rule violates the Act in those situations in which an employee violated the rule by (1) engaging in protected conduct or (2) engaging in conduct that otherwise implicates the concerns underlying Section 7 of the Act." The Board further held that "an employer will avoid liability for discipline imposed pursuant to an overbroad rule if it can establish that the employee's conduct actually interfered with the employee's own work or that of other employees or otherwise actually interfered with the employer's operations, and that the interference, rather than the violation of the rule, was the reason for the discipline." Id.

The judge correctly recognized that "[n]o party contends that the conduct for which Excellent was suspended and discharge[d] is protected conduct meeting the first prong of the [*Continental Group*] standard" (ALJD p. 21, lines 17-19).[33] The judge erred, however, in concluding that Excellent engaged in conduct that "otherwise implicates the concerns underlying Section 7."

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[32] Although she failed to address the issue in her analysis (ALJD pp. 21-23), the judge concluded that Excellent was also unlawfully *suspended* pursuant to the cell phone policy (ALJD p. 27, fn. 23, p. 28, lines 22-25). The judge's conclusion is wrong. Excellent was suspended pursuant to Respondent's established practice of automatically suspending employees for suspected violations of the cell phone policy pending an investigation (Tr. 273, 283, 285, 323, 406-407). He was *not* suspended for actually violating the policy.

[33] Indeed, when asked what he would use his phone for if he were permitted to have it in his truck, Excellent responded that he would use it to keep in touch with his family (Tr. 137-138).

The judge reached her erroneous conclusion by focusing on whether Excellent's discipline was likely to chill other employees' exercise of Section 7 rights. According to the judge, "[E]mployees learning that Excellent was suspended and discharged because Respondent suspected he possessed his cell phone in the commercial vehicle he drove is very likely to chill employees protected use of cell phones in similar circumstances" (ALJD p. 22, lines 5-8). The judge's analysis is flawed in multiple respects.

First, as argued above in connection with the lawfulness of Respondent's cell phone policy, the judge mistakenly assumed that employees have a guaranteed right under Section 7 to possess and/or use a personal cell phone to call and text while at work. The Board has never held as much, presumably because such a recognition would conflict with established Supreme Court precedent. See *Nutone*, 357 U.S. at 364 ("[The Act] does not command that labor organizations as a matter of abstract law, under all circumstances, be protected in the use of every possible means of reaching the minds of individual workers . . . .").

Second, contrary to the judge's understanding, Excellent was discharged for *using* his cell phone while operating a ready mix truck, not simply for possessing his cell phone in the truck. Based on the location where his cell phone was found (i.e., a dangerous work area), his assertion that he "always" has his phone in his pocket, and, more importantly, his blanket refusal to provide his cell phone records pursuant to Respondent's request, Respondent reasonably believed that Excellent had not only possessed but *used* his cell phone while operating his truck. The judge misunderstands the significance of Excellent's failure to produce his cell phone records.

The purpose of requesting Excellent's cell phone records was to confirm whether or not he *used* his cell phone while operating his truck. Common sense dictates that Excellent's cell phone records would not have proved whether he simply *possessed* the phone, because cell phone records

obviously only reflect incoming and outgoing calls. Beer even confirmed repeatedly during his negotiations with Rolle that Argos was requesting the cell phone records to confirm whether Excellent *used* the phone (GC Exh. 8). If the records did not show that he used the phone while operating his vehicle (i.e., that, at worst, he merely *possessed* it while operating his vehicle), then Respondent was willing to reinstate him (Tr. 408).

2. Excellent's Conduct Interfered with Respondent's Operations

Under *Continental Group*, an employer "will avoid liability for discipline imposed pursuant to an overbroad rule if it can establish that the employee's conduct actually interfered with the employee's own work or that of other employees or otherwise actually interfered with the employer's operations, and that the interference, rather than the violation of the rule, was the reason for the discipline." *Continental Group,* above at 412. The judge found no evidence in the record that Excellent's conduct interfered with the performance of his or other employees' work (ALJD p. 22, lines 32-33). She also found no evidence that Excellent interfered with Respondent's operations because, as discussed above, she concluded he was discharged for possessing, rather than using, his cell phone while operating his truck (ALJD p. 22, lines 39-46).[34]

Again, the judge's conclusion that Excellent was discharged for merely possessing his cell phone is contradicted by the record. If Excellent's cell phone records had demonstrated that he did not use his phone on March 3 while operating his vehicle, he would have been reinstated, regardless of whether he actually *possessed* his cell phone while operating his vehicle. Thus, consistent with the judge's acknowledgement that using a cell phone interferes with Respondent's

[34] The judge acknowledged that Excellent's use of his cell phone while operating his vehicle would have interfered with Respondent's operations sufficient to support the affirmative defense under *Continental Group* (ALJD p. 22, lines 39-46).

operation, see ALJD p. 22, lines 39-46, Respondent has established an affirmative defense under *Continental Group*.

C. EXCELLENT'S SUSPENSION

The judge erred in finding that Respondent unlawfully failed to provide the Union notice and an opportunity to bargain before suspending Excellent on March 3.

1. *Total Security* Should Be Overturned.

In *Total Security*, the Board held that employers are obligated to provide notice and an opportunity to bargain before imposing serious discipline on employees represented by a union but not yet covered by a collective-bargaining agreement. 364 NLRB No. 106, slip op. at 1.[35] The Board should take this opportunity to overrule *Total Security* for the reasons set forth by then-Member Miscimarra in his dissent in that case.[36]

In short, *Total Security* cannot be squared with long-standing Board precedent governing decision and effects bargaining. Moreover, it conflicts with Section 8(a)(5) and 8(d) of the Act, as well as the Supreme Court's decision in *NLRB v. Weingarten*, 420 U.S. 251 (1975). Further, it imposes impractical and unworkable bargaining requirements that disrupt business operations and create obstacles to the negotiation of a first contract.

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[35] *Total Security* essentially applied the same reasoning applied by the Board in *Alan Ritchey, Inc.*, 359 NLRB 396 (2012). Until *Alan Ritchey*, the Board had never held that an employer was obligated to provide a union notice and an opportunity to bargain before implementing discretionary discipline. *Alan Ritchey* was invalidated by *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014).

[36] As he has done with *Purple Communications*, the General Counsel is now taking the position in cases concerning the application of *Total Security* that the decision should be overruled. See, e.g., *800 River Road Operating Company*, Case 22-CA-204545, Brief for General Counsel (Mar. 14, 2019) ("[T]he GC believes that *Total Security* was wrongly decided and seeks to have *Total Security* overturned."). Respondent anticipates that counsel for the General Counsel will adopt the same position in this case.

The Board should return to prior precedent, including *Fresno Bee*, 337 NLRB 1161 (2002), which held that when an employer does not change its pre-existing disciplinary policies but merely exercises some discretion in applying them, the imposition of discipline pursuant to those policies does not constitute a change in a term or condition of employment sufficient to trigger a bargaining obligation. As explained further below, Respondent did not exercise discretion in applying its policy mandating suspension pending investigation for suspected violations of the cell phone policy. However, to the extent discretion was involved, it was pursuant to pre-existing disciplinary policies, which under pre-*Total Security* law, does not constitute a change in a term or condition of employment.

2. Respondent Did Not Exercise Discretion in Suspending Excellent.

In *Total Security*, the Board held that the imposition of discipline on employees alters their terms and conditions of employment and implicates the duty to bargain only "if it is not controlled by pre-existing, nondiscretionary employer policies or practices." *Total Security*, above at 3. In the instant case, Excellent's suspension pending investigation for his suspected violation of the cell phone policy was controlled by a pre-existing, nondiscretionary policy. *Cf.* id. at 2 ("The Respondent exercised discretion in discharging each of the employees; it did not apply any uniform policy or practice regarding discipline for their asserted misconduct.").

HR Director Beer unequivocally testified that suspension pending investigation is an "automatic" procedure (Tr. 365). He explained, "The reason we do that is to give . . . us the opportunity to thoroughly investigate and give the employee the opportunity to come forth with any information, and then we make a good decision with regard to it" (Tr. 437). This is important, Beer added, because "it's difficult to . . . get good drivers and retain them" (Tr. 437).[37]

[37] Beer reiterated this policy to Union representative Rolle when he first notified him about Excellent's suspected violation on March 8: "Per past practice, Mr. Excellent was suspended pending

Division Manager Marion and District Manager Kennedy likewise confirmed Respondent's "automatic" suspension policy for suspected cell phone policy violations. Marion testified: "There is no wiggle room there at all. It is a consistent policy that we follow." (Tr. 314.) Kennedy testified that Respondent has suspended employees "[e]very time we've ever had a situation like [Excellent's situation]" (Tr. 349). When asked whether a cell phone policy violation could possibly not invoke a suspension pending investigation, Kennedy answered simply, "That has never happened" (Tr. 401).

Consistent with Beer's, Marion's, and Kennedy's testimony, Respondent introduced 11 examples from Argos-Florida where drivers were automatically suspended pending investigation for a suspected violation of the cell phone policy and then discharged for violating the policy:

- Lester Austin's cell phone was found on a job site. He was "suspended that day" pending an investigation into whether the phone was in his cab. (Tr. 304-305.) Austin initially denied the phone was his but later admitted it. He was ultimately terminated. (R. Exh. 3; Tr. 304-306.)
- Pablo Garcia was "witnessed on the phone" in his truck by Division Manager Marion and a shop foreman (Tr. 354). He was immediately suspended pending investigation and ultimately terminated after admitting to the violation. (R. Exh. 5; Tr. 354-355.)
- Robert Williams "called the [Naples] shop on his [cell] phone" while he was making a delivery (Tr. 356). He was immediately suspended pending an investigation. The investigation revealed that Williams not only used his cell phone to call the shop, he ran out of gas while on a delivery and lied to management about

investigation" (GC Exh. 8). In his initial response to Beer's March 8 communication on March 13, Rolle did not question the decision to suspend Excellent pending investigation or request bargaining over it. Instead, Rolle raised concerns that the request for Excellent to provide cell phone records, and the alleged policy of requiring employees to leave cell phones in their personal vehicles, were "new" policies. (R. Exh. 11(b).) In a March 15 email, Beer further informed Rolle: "The facts show that our approach in this particular case is entirely in conformity with our past practice when it comes to investigating similar allegations (including at least one prior incident in which you were personally involved) (R. Exh. 11(c)). In a March 16 email to Beer, Rolle again questioned Respondent's request for Excellent's cell phone records, and he questioned the length of time Excellent had been on suspension; but, he never challenged Respondent's policy of automatic suspension pending investigation for suspected cell phone policy violations, and he never requested bargaining over the suspension. (R. Exh. 11(d).)

running out of gas. He was ultimately terminated for all three infractions. (R. Exh. 6; Tr. 235-237, 356-357.)

- Alberto Crespo "called the plant manager . . . from his cell phone" while at a job site (Tr. 358). He was instructed to return to the plant, at which point Respondent "suspended him pending an investigation" (Tr. 358). He was ultimately terminated (R. Exh. 7).
- Rafael Bello called into dispatch on his cell phone instead of using the radio to report that he spilled some concrete. He was immediately suspended pending an investigation. During the investigation Bello initially claimed that it was not his cell phone, but management compared his number to the number received by dispatch and concluded that it was. Bello also showed the plant manager a picture of a spill taken from his phone. He was ultimately terminated. (R. Exh. 8; Tr. 359-361.)
- Joshua Bowes' Bluetooth headset was found on the floorboard of his truck cab during an inspection. He admitted to making calls from his truck using the headset. He was suspended pending investigation and ultimately terminated. (R. Exh. 9; Tr. 362.)
- Luis Ramirez was found in possession of a cell phone during an inspection of his vehicle. He was immediately suspended pending an investigation and ultimately terminated. (R. Exh. 12; Tr. 425.)
- John Miller's cell phone was found at a jobsite. He was immediately suspended pending an investigation and ultimately terminated. (R. Exh. 13; Tr. 436.)
- Erick Abreu was found concealing a cell phone in his lunch box, which was in his vehicle. Although there was no direct evidence that Abreu was suspended pending termination, HR Director Beer testified that he should have been suspended, given Argos-Florida's consistent practice (Tr. 437). Moreover, the incident occurred on May 18, 2016, and Abreu was discharged on May 20, 2016, strongly suggesting that the practice was followed. Abreu was ultimately terminated. (R. Exh. 14.)
- Eric Hubbard was witnessed texting on his cell phone while in his vehicle on a jobsite. He was suspended pending investigation and ultimately terminated. (R. Exh. 15; Tr. 437-438.)
- Craig Wargo[38] had "just returned from a jobsite, and got out of his truck" and was heading to a manager's office when his phone "went off" (Tr. 429). He was immediately suspended based on suspicion that he had his phone when he was in his truck. Wargo subsequently provided his cell phone records, which demonstrated that he had used his phone while away from the plant with his truck. Consequently, he was terminated. (R. Exh. 16; Tr. 429-430.)

Remarkably, the judge discounted Beer's, Marion's, and Kennedy's testimony, as well as the above-examples from Argos-Florida, concerning Respondent's "automatic" (i.e.,

[38] Wargo is incorrectly identified as "Largo" in the transcript.

nondiscretionary) policy for suspected cell phone policy violations because 1) Respondent did not "point to a written policy" (ALJD p. 26, lines 12-13), and 2) outside of the Florida region, the documentary evidence shows that "other managers rarely follow this practice" (ALJD p. 26, lines 13-14). The judge's reasoning is faulty.

The fact that Argos does not maintain a written policy stating that employees are to be automatically suspended pending investigation for suspected cell phone policy violations does not mean that the underlying policy is nondiscretionary. As outlined above, the uncontradicted evidence establishes that, at Argos-Florida, the unwritten practice is to automatically suspend. Whether the practice is documented is irrelevant to the issue of whether it exists. Cf. *Rosdev Hospitality, Secaucus, LP*, 349 NLRB 202, 208 (2007) ("[A]n employer's past practices and *unwritten policies* which involve the application of terms and conditions of employment are viewed as mandatory subjects of bargaining which are protected from unilateral change.") (emphasis added); *Ryder Student Transportation Services*, 332 NLRB 9 (2001) (finding employer's unwritten no-access policy unlawful).

The judge observed that Respondent's "Cell Phone Policy while operating a Vehicle" (GC Exh. 5, pp. 6-7), "Cellular Telephone Acknowledgment" (GC Exh. 2), and "Progressive Discipline Table—A Guideline" (GC Exh. 10) suggest varying degrees of discipline for cell phone policy violations and, therefore, "[i]nherent in each of these suggested disciplines . . . is that the managers do have discretion in what punishment to levy" (ALJD p. 25, lines 24-36). The judge's reliance on these documents is misplaced.

Whether managers have discretion in the punishment ultimately to level on an employee for violations of the cell phone policy is an entirely separate issue from whether managers have discretion in initially suspending employees pending investigation for suspected violations of the

policy. The sole issue pertinent to Excellent's suspension is whether Respondent's "suspension pending investigation" practice was discretionary or automatic. Consequently, it is entirely irrelevant what Respondent's documents say about ultimate discipline.

Regarding the practice of "suspension pending investigation," the "Cell Phone Policy while operating a Vehicle" (GC Exh. 5, pp. 6-7) and "Cellular Telephone Acknowledgment" (GC Exh. 2) are silent. The "Progressive Discipline Table—A Guideline" (GC Exh. 10) includes a column labeled, "Investigation – to determine level of discipline to be administered." The column lists a variety of infractions, including fighting, insubordination, and "Violation of any other Company Policies," which would necessarily include violations of the cell phone policy (GC Exh. 10). Thus, contrary to the judge's understanding, the "Progressive Discipline Table—A Guideline" is consistent with Respondent's practice of suspending employees for suspected violations of the cell phone policy pending an investigation.

The judge's reliance on examples outside of Argos-Florida to support her conclusion that "suspension pending investigation" is a discretionary practice is equally flawed. Over Respondent's objections, 46 examples were introduced into evidence after the hearing.[39] (GC

[39] The judge's decision to overrule Respondent's objection to evidence outside the Argos-Florida Region is itself reversible. Counsel for the General Counsel subpoenaed the records on May 7, 2019, a few weeks before the hearing. This was the first time Respondent was aware that counsel for the General Counsel's theory might expand beyond Argos-Florida, as the Region never requested evidence outside Argos-Florida during its investigation of the underlying charges. Respondent filed a petition to partially revoke the subpoena on May 15, 2018. Between May 15 and June 11, 2018, Respondent's counsel and counsel for the General Counsel communicated multiple times about the scope of the subpoena, and counsel for the General Counsel confirmed she was willing to limit her requests to Argos-Florida. Indeed, during a pre-trial conference call with the judge, counsel for the General Counsel even represented that the parties were close to a compromise on the subpoena, and she was confident that a stipulation would be reached before the hearing. Two days before the hearing, counsel for the General Counsel notified Respondent's counsel that she would not rescind her request for documents outside of Argos-Florida. Given Respondent's counsel's surprise by this untimely change in position, Respondent was unable to produce the requested documents during the hearing. While the judge initially entertained arguments from both sides about the scope of the subpoena during the hearing (Tr. 7-24), she

Exhs. 16-24; R. Exhs. 17-53.) The judge viewed these examples as showing that managers outside Argos-Florida "rarely follow" the practice of suspending employees pending investigation of suspected cell phone policy violations. The judge again misses the point.

With the exception of a few instances, every supplemental example from outside Argos-Florida suggests that the driver was suspended before receiving a final discipline, regardless of what that final discipline was. Again, whether the drivers were ultimately discharged, suspended, or given written warnings is irrelevant to the issue at hand, which is whether Respondent's suspension pending investigation practice is automatic or discretionary. Without any testimony on the circumstances surrounding the supplemental examples, and in light of the fact that there are gaps between the incident and the final discipline, the only reasonable inference that can be drawn from the evidence is that Respondent's practice is consistent, even when considering evidence beyond Argos-Florida.

In *Libertyville Toyota*, 360 NLRB 1298 (2014), enfd. sub nom *AutoNation, Inc. v. NLRB*, 801 F.3d 767 (7th Cir. 2015), the Board rejected the General Counsel's reliance on evidence of an inconsistent practice of suspending employees for violating the employer's policy requiring

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determined they were "relevant" (Tr. 21) without hearing any evidence on the matter, including Beer's testimony about inconsistencies among regions. On the second day of the hearing, the judge overruled Respondent's objection (Tr. 208-209). After the hearing, the parties entered into a stipulation that evidence of discipline outside Argos-Florida could be submitted for the record, but no additional testimony would be presented. Also, Respondent reserved its right to maintain its objection to the admissibility of the evidence. In her decision, the judge relies extensively on the supplemental evidence introduced after the hearing to support her conclusion that Respondents practice is discretionary. Because the evidence introduced during the hearing established a consistent practice at Argos-Florida, and HR Director Beer credibly testified that not all regions operated consistently with respect to Respondent's policies and procedures (Tr. 66)—which evidence was confirmed by the fact that 3 different disciplinary forms were used in the supplemental examples, as the judge observed (ALJD p. 12, line 5)—the judge's decision to overrule Respondent's objection was erroneous.

employees to maintain a driver's license.[40] The documentary evidence reflected a gap in time between the date some comparators lost their licenses and the date they were offered a waiver to continue working, which the Board found suggested it was "possible" those employees served a suspension. Id. at 1302. At a minimum, the Board explained, the evidence did not establish any grounds for rejecting the employer's evidence that it always suspended employees for losing their licenses. Id. The Board also rejected the General Counsel's reliance on the testimony of an employee who claimed that he lost his license on two occasions and was allowed to continue working without being suspended. Id. The Board found that evidence insufficient to rebut the manager's testimony, especially since the manager (whose suspension policy was at issue) was not working at that time. Id. (citing *Merillat Industries*, 307 NLRB 1301, 1203 (1992) ("The Respondent's defense does not fail simply because not all the evidence supports it, or even because some evidence tends to negate it.")).

Here, as in *Libertyville Toyota*, the record evidence strongly supports the conclusion that Respondent's practice of suspending employees is automatic. To the extent any outlier examples from other regions were properly considered by the judge, they are insufficient to refute the otherwise consistent practice, especially given the absence of evidence of an inconsistent practice by the actual managers at Argos-Florida who suspended Excellent.

Finally, the judge contends that even if Respondent's policy of suspension pending investigation, on the whole, was nondiscretionary, it was discretionary to apply that practice to Excellent, because the circumstances under which he was suspended "differ significantly" from

[40] At issue in *Libertyville Toyota* was whether the employer satisfied its burden under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), of proving that it would have suspended the employee notwithstanding his union activity. The General Counsel argued that evidence of inconsistent application of the practice undermined the employer's defense.

other employees within the Argos-Florida region who were suspected of violating the cell phone policy (ALJD p. 25, fn. 20). According to the judge, "A review of the disciplines that occurred in the Florida region shows that in each of those cases Respondent had some sort of direct evidence that the driver had a cell phone or hands-free device in one of Respondent's commercial vehicles while operating it[,]" whereas "Respondent only had circumstantial evidence that Excellent had his cell phone in his work truck when they suspended him" (ALJD p. 25, fn. 20). The judge misreads the record.

Lester Austin's and John Miller's cell phones were found on job sites, which *circumstantially* proved they were in possession of their cell phones while driving their trucks. (R. Exh. 3; R. Exh. 13; Tr. 304-306, 436.)[41] Robert Williams, Alberto Crespo, and Rafael Bello called into the Naples plant while making deliveries, which likewise *circumstantially* proved they were in possession of their cell phones while driving their trucks. (R. Exhs. 6-8; Tr. 235-237, 356-361.)[42] Craig Wargo had "just returned from a jobsite, and got out of his truck" and was heading to a manager's office when his phone "went off" (Tr. 429), which circumstantially proved that he had his phone with him moments earlier when he was operating his truck.

Like Excellent, all of these employees were immediately suspended pending investigation despite the lack of direct evidence that they possessed or used their cell phones in their trucks. Contrary to the judge's reasoning then, Excellent's situation is not distinguishable and does not support a conclusion that suspending him—but not everyone else—was discretionary.

[41] The fact that their cell phones were found at the job sites does not *directly* prove they possessed them in their trucks because someone could have brought their cell phones to them at the job sites.

[42] These drivers could have stopped and made the calls from a customer's cell phone or a landline.

3. Exigent Circumstances Justified Respondent's Unilateral Suspension of Excellent.

Even accepting the judge's conclusion that Respondent exercised discretion in suspending Excellent, its failure to provide the Union notice and an opportunity to bargain was excused due to exigent circumstances. In *Total Security*, the Board recognized that in "exigent circumstances . . . the employer may act prior to bargaining provided that, immediately afterward, it provides the union with notice and an opportunity to bargain about the disciplinary decision and its effects." *Total Security*, above at 8. The Board defined "exigent circumstances" as situations "where an employer has a reasonable, good-faith belief that an employee's continued presence on the job presents a serious, imminent danger to the employer's business or personnel." Id. at 9. The Board noted that, in these circumstances, "an employer could suspend an employee pending investigation" and then "promptly notify the union of its action and the basis for it and bargain over the suspension after the fact, as well as bargain with the union regarding any subsequent disciplinary decisions resulting from the employer's investigation." Id. at fn. 20.

Division Manager Marion testified directly to the exigent circumstances that warranted Excellent's immediate investigatory suspension. According to Marion, "I would not let [Excellent] . . . or for that matter any employee in this situation [back] in a truck . . . [because] these ready mix trucks weigh 70,000 pounds loaded[,]" and "I have an obligation to Argos and my employees and the general public (Tr. 272-273). Marion continued, "So until we can investigate and come to some conclusion with facts, I could not risk my employee, my employees and the general public with a 70,000 pound truck if somebody is on the cell phone" (Tr. 273).

The judge ignored Marion's testimony and found that no exigent circumstances existed at the time Excellent was suspended. According to the judge, Respondent had no evidence that Excellent ever "used his phone while driving" his ready mix truck, and "there is no evidence of

record that the mere presence of a cell phone in a ready-mix truck cab increases the likelihood of an accident" (ALJD p. 25, lines 3-5). Yet again, the judge's reasoning is seriously flawed.

Respondent *did* have evidence that Excellent used his phone while driving his truck. It was discovered in the slump rack precisely where his driver's side door was before driver Chadwick pulled up. Moreover, he admitted that he carried his phone in his pocket, and most telling, he refused to provide his records, which could have proved he had not used his phone, if indeed that were true. This was more than enough to give Respondent a reasonable, good-faith belief that Excellent had been using his phone while operating his truck. Regardless, whether Respondent had evidence that Excellent *used* rather than merely *possessed* his cell phone in the truck is irrelevant to the exigent circumstances analysis. Respondent acted out of concern that Excellent violated the cell phone policy by using or possessing a phone in his truck. This was enough to warrant his immediate exclusion from operating a truck until an investigation could be conducted.

The judge's assertion that there is no evidence the mere presence of a cell phone in a ready mix truck increases the likelihood of an accident is equally unsound. The judge's comment ignores the obvious: possessing a cell phone necessarily increases the likelihood of an accident, as the accident statistics discussed above plainly confirm.

IV. CONCLUSION

For the reasons set forth above, the Board should find merit in Respondent's exceptions and dismiss the complaint.

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July 12, 2019

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ARGOS USA LLC d/b/a ARGOS READY MIX, LLC,	)	
Respondent,	)	
	)	**Cases: 12-CA-196002**
and	)	**12-CA-203177**
CONSTRUCTION AND CRAFT WORKERS LOCAL UNION NO. 1652, LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO	)	
Charging Party.	)	

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of July, 2019, a true and correct copy of the foregoing RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION was filed using the National Labor Relations Board E-filing system, and a copy of the aforementioned was thereafter served upon the following parties via electronic mail on the 12th day of July, 2019, as follows:

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